TOHONO O'ODHAM NATION (FORMERLY PAPAGO TRIBE OF ARIZONA)

v.

AREA DIRECTOR, PHOENIX AREA OFFICE, BUREAU OF INDIAN AFFAIRS 1/

IBIA 86-14-A Decided March 31, 1987

Appeal from a decision of the Area Director, Phoenix Area Office, Bureau of Indian Affairs, concerning the use of program funds to pay BIA's monitoring and technical assistance costs for a contract under the Indian Self-Determination Act.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination Act, 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedure in 25 CFR Part 271.

1/ In pleadings and previous orders in this case, the appellee has been identified as the Agency Superintendent, Papago Agency, Bureau of Indian Affairs. From the briefs and exhibits filed by the parties, it is apparent that the decision appealed to the Board was issued by the Phoenix Area Director.

2. Administrative Procedure: Administrative Review--Board of Indian Appeals: Generally

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

3. Appropriations--Bureau of Indian Affairs: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

Sec. 106(h) of the Indian Self-Determination Act, 25 U.S.C. § 450j(h) (1982), does not preclude the use of program funds to pay costs incurred by the Bureau of Indian Affairs in monitoring and providing technical assistance for a contract under the Act.

APPEARANCES: Dabney R. Altaffer, Esq., Tucson, Arizona, for appellant; Robert Moeller, Esq., Office of the Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for appellee.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE VOGT

Appellant Tohono O'odham Nation challenges a November 21, 1984, decision of the Area Director, Phoenix Area Office, Bureau of Indian Affairs (appellee; BIA) affirming the decision of the Papago Agency Superintendent (agency; Superintendent), to retain $39,300 of the tentative amount of $642,000 allocated to appellant's FY 1985 Indian Self-Determination Act (P.L. 638) 2/

2/ Title I, Indian Self-Determination and Education Assistance Act, Jan. 4, 1975, 88 Stat. 2203, 2206, P.L. 93-638, 25 U.S.C. §§ 450f-450n (1982). All references to the United States Code are to the 1982 edition.

contract for social services. The amount retained was to be used for contract monitoring and technical assistance. For the reasons discussed below, the Board affirms that decision.

Background

On May 2, 1984, the Superintendent wrote to appellant concerning deadlines for appellant's FY 1985 P.L. 638 contract and grant applications and the tentative funding levels for its FY 1985 P.L. 638 programs. An enclosure with the Superintendent's letter listed the programs and the funding levels for each. For the social services program, the enclosure stated that the tentative FY funding level was $642,000, less a monitoring cost of $39,300, for a revised funding level of $602,700. Appellant states that it appealed this letter to appellee; the record does not disclose what became of this appeal. 3/

On October 2, 1984, the Superintendent again wrote to appellant concerning its social services program. That letter states in relevant part:

> Please be advised that the Papago Agency tentative FY 1985 base for its Social Services Program is $642,000.00. The Papago Agency is retaining $39,300.00 of the above amount for contract monitoring and technical assistance. The remaining amount of $602,700.00 is available for direct costs for the Tribe to recontract its Social Services Program for FY 1985. Please resubmit a new budget and budget justification in the amount of $602,700.00 for direct administrative costs.

3/ As discussed below, the Board never received BIA's administrative record in this matter.

By letter dated November 1, 1984, appellant appealed to appellee, arguing that the retention of funds for monitoring and technical assistance violated section 106(h) of P.L. 638, 25 U.S.C. § 450j(h), the intent of Congress, and directives of the Assistant Secretary--Indian Affairs.

On November 21, 1984, appellee affirmed the Superintendent's decision, stating, at page 2 of his letter, that "a portion of program funds are [sic] appropriately used in meeting the Superintendent's responsibility and function." By letter dated December 19, 1984, appellant appealed to the Deputy Assistant Secretary--Indian Affairs (Operations).

Although it disagreed with the Area Director's decision, appellant executed a P.L. 638 social services contract for FY 1985 on November 30, 1984. Section 103 of the contract provides in relevant part:

> 103. Non-Contracted Portion of Bureau Program(s)
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> The Government, through the Bureau of Indian Affairs, shall:
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> 103.1 Provide all technical assistance monitoring services to ensure Contractor compliance with the term of this contract and to ensure the proper delivery of services to individual Indian people.

Appellant stated in both its November 1 and December 19 appeal letters that its acceptance of the contract was under protest.

On November 22, 1985, the Board received a motion from appellant request-

ing it to assume jurisdiction over the appeal pursuant to 25 CFR 2.19. 4/ On November 25, 1985, the Board made a preliminary determination that it had jurisdiction and requested the administrative record. On January 17 and April 11, 1986, the Board made subsequent requests for the record. Finally, on June 13, 1986, the Board docketed the appeal without the record, again requested BIA to forward the record, and advised the parties that, if the record was not forwarded, a decision or order would be rendered on the basis of the record created before the Board by the parties' filings.

The Board has never received the administrative record. It has, however, received briefs and exhibits from appellant and appellee.

Contentions of the Parties

Appellant's arguments before the Board are essentially the same as those it made in earlier stages of this appeal. It argues that BIA improperly withheld $39,300 of program funds allocated to the agency for FY 1985 from appellant's P.L. 638 social services contract. It contends that BIA program funds may not be used to pay BIA's costs in monitoring performance of P.L. 638 contracts; rather, these costs must be paid from BIA's budget for administration.

4/ 25 CFR 2.19 provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review functions or the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

In support of its position, appellant relies on section 106(h) of P.L. 638, 25 U.S.C. § 450j(h), which provides:

> The amount of funds provided under the term of contracts entered into pursuant to sections 450f and 450g of this title [relating to contracts by the Secretary of the Interior and the Secretary of Health and Human Services] shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract: Provided, That any savings in operation under such contracts shall be utilized to provide additional services or benefits under the contract.

Appellant also cites statements from the legislative history of P.L. 638, appearing in S. Rep. No. 682 and H.R. Rep. No. 1600, 93rd Cong., 2nd Sess. (1974), which essentially reiterate the language of section 106(h), and a 1982 statement of the Deputy Assistant Secretary--Indian Affairs (Policy) acknowledging the responsibility of BIA employees to monitor P.L. 638 contract performance. 5/

Appellant further submits a statement from the House report on Department of the Interior appropriations for FY 1985: "The [House] Committee [on Appropriations] notes that $925,000 is included for 93-638 oversight/cost

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5/ "We think we are now in a position to have contract monitoring and compliance under control with existing staff levels by simply demanding that the COR's and GOR's do their job and that we are able to account for that. * * * If you are line office, you are a superintendent and a line officer in this organization. You are responsible for making sure that those contracts and grants are monitored in your agency and under your jurisdiction and reporting in on a quarterly basis the program that they are having and/or the difficulties so that the proper technical assistance can go forward."
(Emphasis supplied by appellant.)
Appellant identifies the statement as having been made at hearings before the Senate Select Committee on Indian Affairs, but gives no citation.

determination activities. The Committee intends that no additional funds be assessed from 93-638 contract funds for oversight or monitoring purposes." H.R. Rep. No. 886, 98th Cong., 2nd Sess. 51 (1984). Appellant states that the committee's remark was made in response to appellant's complaint to the committee regarding BIA's position on the matter at issue here.

Appellee argues that the Superintendent's decision was a tentative planning decision which was not implemented, and that the facts upon which the appeal is based are therefore obsolete, making the appeal moot. He states that the final funding for the agency social services program for FY 1985 was reduced from the tentative amount of $642,000 to $629,300, and that the amount finally contracted to appellant, after three modifications to the original contract, was $631,189, almost $2000 more than the agency program funding level. Appellee submits an affidavit from a Phoenix Area program analysis officer which states in relevant part:

> The decision of the Superintendent to withhold $39,300 from the Papago Agency tentative FY 1985 base for Social Services administration had no effect on the amount of $629,300 which was finally allocated to the Papago Agency Social Services Program. In other words, the Superintendent's decision to withhold $39,300 was a local decision based on tentative funding levels and was not a factor in the amount finally allocated for the agency's Social Services Program.

He argues therefore that no reduction in appellant's P.L. 638 contract funds actually occurred, despite the Superintendent's announced intent to retain funds for monitoring and technical assistance, and consequently the

Board need not decide the legality of the Superintendent's decision to retain funds.

Appellee argues that the House Appropriations Committee report language relied upon by appellant, relating to FY 1985 appropriations for P.L. 638 oversight and cost-determination activities, was not directed to the monitoring costs incurred in the day-to-day monitoring by BIA field personnel but, rather, concerned a newly established office in BIA. In support of this argument, he submits an excerpt from the BIA budget justification for FY 1985 describing the new program and requesting an appropriation of $925,000 to fund it. Appellee further argues that $925,000 would be insufficient to fund performance monitoring of hundreds of P.L. 638 contracts throughout the country.

Finally, appellee argues that retention of program funds for monitoring purposes is permissible. He states at page 5 of his brief:

> In fact when the BIA operates a program the expense of monitoring performance is paid for by program funds. The fact that a tribe contracts a program should not require the BIA to go to other sources to pay for monitoring. Implicit in the BIA's responsibility to oversee the expenditure of program funds is the authority to retain moneys in order to do so.

In its reply brief, appellant argues that the controversy is not moot because appellee's decision and his filings in this appeal express his policy to continue to withhold program funds to cover BIA's monitoring costs. Appellant also repeats its argument that the House Appropriations Committee

statement in H.R. Rep. No. 886, supra, precludes the withholding of program funds for monitoring purposes.

Jurisdiction

[1] Although no party has raised the issue, the Board must consider whether it has jurisdiction over this appeal in light of 25 CFR Part 271, Subpart G, which sets out an appeal procedure, not including appeals to the Board, for at least some P.L. 638 contracting decisions. 25 CFR 271.81 provides for appeal of Area Directors' decisions to the Commissioner, 6/ and for informal conferences and formal hearings if requested by a tribal organization. 25 CFR 271.82 provides for appeal of the Commissioner's decisions to the Assistant Secretary--Indian Affairs. Neither section specifies the kinds of decisions which are subject to this appeal procedure. 7/ Arguably, any Area Director's decision made during the contract negotiation process, including the decision on appeal here, is subject to the appeal procedure set out in 25 CFR Part 271, Subpart G, rather than 25 CFR Part 2, BIA's general appeal procedure. 8/ On the other hand, the procedure in Part 271, Subpart G, may

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6/ The office of Commissioner of Indian Affairs is presently vacant. Although new delegations of authority to officials entitled Deputies to the Assistant Secretary--Indian Affairs have recently been published in the Departmental Manual, the Board is uncertain as to whether one of these officials now performs the Commissioner's function under 25 CFR 271.81. See 230 DM 2.1 (Feb. 9, 1987).

7/ Prior to amendment in 1980, Part 271 set out a special appeal procedure for decisions to decline to contract, to decline to amend a contract, and to cancel a contract for cause, and provided that any other decisions could be appealed pursuant to 25 CFR Part 2. 25 CFR 271.82-271.84 (1979).

8/ Appeals from decisions of contracting officers under executed P.L. 638 contracts are within the jurisdiction of the Interior Board of Contract Appeals. 43 CFR 4.1(b)(1); Papago Indian Tribe of Arizona, 22 IBCA 191, 93 I.D. 136 (1986).

have been intended to apply only to the specific decisions identified elsewhere in Part 271 as subject to the appeal procedure, e.g., decisions to decline to contract or amend a contract, to reassume, or to cancel a contract, 9/ leaving other decisions subject to Part 2.

The Board would normally be reluctant to interpret this regulation, with regard to the intended appeal procedure for decisions such as the one now before it, without briefing from the parties. However, while this appeal was pending, the Board received a copy of an October 22, 1986, decision of the Assistant Secretary--Indian Affairs, which involves the identical issue raised in this appeal and which states at page 1 that: "This decision is in accord with provisions of 25 CFR [Part] 2." The Assistant Secretary has thus construed his regulations to mean that appeals from decisions concerning the instant issue fall under Part 2 rather than under the appeal procedure in Part 271. The Board defers to the Assistant Secretary's interpretation of his regulations on this point and therefore finds that it has jurisdiction over this appeal pursuant to 25 CFR Part 2.

Discussion and Conclusions

[2] Appellee argues that the Board should not decide this appeal because it is moot. The Board recently discussed the doctrine of mootness in Estate of Peshlakai v. Navajo Area Director, 15 IBIA 24, 32-34, 93 I.D. 409, 413-14 (1986). In deciding to address an issue arguably moot, the Board there

9/ See 25 CFR 271.25, 271.64, 271.74, 271.75.

invoked the recognized exception to the mootness doctrine which concerns potentially recurring questions raised by short-term orders, capable of repetition, yet evading review. See, e.g., Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). The issue here similarly falls within this exception to the doctrine which normally precludes consideration of moot issues. From the materials before the Board, it appears very likely that the issue will arise again in the Phoenix Area Office. The Assistant Secretary's decision referred to above, and discussed further below, demonstrates that the issue has arisen in at least one other BIA Area Office. Therefore, the Board will proceed to the merits of this case.

[3] Appellant does not contend that BIA may not monitor appellant's contract performance but only that it must do so using funds budgeted for administration rather than for programs. To use program funds for monitoring purposes, appellant argues, runs afoul of section 106(h) of P.L. 638, 25 U.S.C. § 450j(h), which provides: "The amount of funds provided under the terms of [P.L. 638] contracts * * * shall not be less than the * * * Secretary would have otherwise provided for his direct operation of the program or portions thereof for the period covered by the contract."

The issue raised in this appeal is, to a great extent, a budgetary issue not easily addressed in the context of an isolated contract. 10/

10/ Appellant is the only tribe within the jurisdiction of the Papago Agency. Other agencies serve several tribes. It is easy to imagine an agency where some tribes contract a particular program and others do not, so that BIA program staff would be necessary to administer the program for the noncontracting tribes. If appellant is correct, these program personnel would be precluded from monitoring performance of the same program by the contracting tribes.

In view of this, the Board reviewed BIA budget justifications and Senate and House Appropriations Committee reports for a number of years, in an attempt to discover the budgetary practice and whether BIA may have made representations to Congress regarding its interpretation of the mandate of section 106(h).

The program entitled "638 Oversight/Cost Determination" appeared for the first time in the FY 1984 budget justification under the activity General Administration. The justification states: "The Assistant Secretary proposes to establish an organizational entity which would devote its total efforts to the oversight and evaluation of the Bureau's P.L. 93-638 contract and grant administration function to assure contract/grant fund accountability, proper delivery of services and improved management control." 11/ $680,000 was sought for the program that year. $925,000 was sought for FY 1985. The FY 1985 budget justification described the program thus:

> The staff (professional and clerical support personnel) will be headquartered in Washington, DC, with some specialists duty stationed at Portland, OR; Minneapolis, MN; and Albuquerque, NM in order to identify problem areas early in the contract/grant administration process for which corrective actions can be taken to increase management effectiveness. The staff's oversight and monitoring efforts will permit the Bureau to focus on those aspects of contract/grant administration related to:
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> -fiscal accountability and control of contract support expenditures;
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> -proper and prompt preparation and submission of expenditure documents by tribes to meet Federal regulatory requirements;

11/ BIA budget justification for FY 1984 at 221, reprinted in Department of Interior and Related Agencies Appropriations for 1984: Hearings Before the Subcomm. on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 98th Cong. 1st Sess., Part 2 at 522 (1983). Hereafter, budget justifications are cited only to the appropriate hearings.

-proper administration of contract/grant programs by Bureau and tribal field officials;

-the monitoring of expenditures for direct and/or indirect costs under P.L. 93-638 contracts and/or grants; and

- the implementation of GAO and OIG recommendation; and

-modifying, or improving contracting and grants administration;

Through its monitoring and evaluation activities, the staff will provide highly visible support to Bureau and Tribal field management officials in resolving existing problems as well as in identifying potential problem areas so that remedial action be expedited.

(1985 Hearings, Part 2 at 655).

In its FY 1986 budget justification, BIA stated: "In FY 1986, this specific effort will be merged into the total effort to improve all procurement action in the Bureau" (1986 Hearings, Part 2 at 536). The program does not appear in the FY 1987 budget justification.

It is this program which appellant contends was the sole source of funds for monitoring P.L. 638 contracts in FY 1985. 12/ However, if this new program was intended to fund all monitoring of P.L. 638 contracts, some discussion of a transfer of the monitoring function should appear in the

12/ Appellant asserts that language concerning this program in H.R. Rep. No. 886, supra, i.e., "The Committee intends that no additional funds be assessed from 93-638 contract funds for oversight or monitoring purposes," resulted from its letter to the House Appropriations Committee concerning the subject of this appeal. Appellant also states that it is unable to locate a copy of its letter. There is no evidence in the record that the House report language did in fact result from appellant's contact with the committee.

budget justifications or the congressional reports, since BIA's responsibility for monitoring P.L. 638 contracts clearly existed prior to the institution of this program in FY 1984. There is no such discussion. See, e.g., S. Rep. No. 184, H.R. Rep. No. 253, 98th Cong., 1st Sess. (1983); S. Rep. No. 578, H.R. Rep. No. 886, 98th Cong., 2d Sess. (1984). Rather, the budget justifications describe a program that was apparently intended to improve monitoring, inter alia, through establishment of a specialized office to lend assistance to BIA employees in the field as well as to tribes.

A program appearing consistently in the budget justifications since at least FY 1978 is entitled "Contract Support." This program is budgeted under Indian Services, Self-Determination Services, and apparently covers primarily "indirect cost" payments to tribes. The FY 1985 budget justification describes the objective of the program: "To pay tribes and/or tribal organizations for tribal incremental costs incurred as a result of their contracting to operate Bureau programs, and to provide funding for costs such as severance pay and lump sum leave payments relative to displacement of Federal employees because of contracting with Indian tribes and/or tribal organizations." It further states:

> The Bureau makes these funds available to tribal contractors in accord with Section 106(h) of P.L. 93-638 * * * which requires that " . . . the amount of funds provided under the terms of the contracts entered into pursuant to Sections 102 and 103 shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the program . . . ."

(1985 Hearings, Part 2 at 531-32).

The FY 1986 budget justification contains similar language. In further discussion of the indirect cost rate, it continues:

> For new [13/] contracts, we project our budget request on the basis of a distribution rate of 15.5%, which is applied to a projected volume of new contracts. This is the Public Law 93-638, Section 106(h) rate. It is the percentage determined, through a FY 1984 study of the total Bureau budget, to be the equivalent of the Bureau's indirect costs and is used for the purpose of meeting the requirements of Section 106(h). [Emphasis in original.]

(1986 Hearings, Part 2 at 423).

From these statements, it is apparent that BIA has represented to Congress that it considers the indirect cost payments to tribes to fulfill the mandate of section 106(h). 14/ Since Congress has continued to appropriate funds for contract support, it might be reasonable to assume that Congress has acquiesced in BIA's interpretation of the program as fulfilling the requirements of section 106(h). When Congress acquiesces in an

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13/ Beginning in FY 1985, at the direction of Congress, contract support funds for existing contracts were merged with program funds. This change was made in an effort to control escalating indirect cost payments. 1985 Hearings, Part 2 at 531-34, 1986 Hearings, Part 2 at 422-23; H.R. Rep. No. 978, 97th Cong. 2d Sess. 20 (1982); S. Rep. No. 184, 98th Cong., 1st Sess. 46 (1983).

14/ Arguably, this representation is inconsistent with 25 CFR 271.54(a), which provides:

"Direct costs under contracts for operations of programs or parts shall not be less that the Bureau would have provided if the Bureau operated the program or part during the contract. Direct costs shall include the Bureau's direct costs for planning, administering, and evaluating the program or part and shall not be used to reduce indirect costs otherwise allowable to the tribal organization."

Neither appellant nor appellee discusses this regulation.

interpretation of a statute by the agency charged with its execution, that interpretation normally acquires additional force. Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 381 (1969).

Moreover, except for the short-lived "638 Oversight/Cost Determination" program, no budget item specifically identified with monitoring appears in the budget justifications. Congress clearly expects BIA to monitor P.L. 638 contract performance, as evidenced by appellant's submissions, see n.5 and accompanying text, supra, and must be aware that funds to pay for monitoring are included in the BIA budget. Yet it has apparently never required BIA to identify specifically the activities under which it budgets monitoring costs, much less to budget those costs only under administration. From the materials it has reviewed, the Board believes it is reasonable to conclude that Congress has not, as a matter of course, interpreted section 106(h) to require that BIA budget all its costs for monitoring under administration rather than under the programs.

On October 22, 1986, the Assistant Secretary issued a decision in an appeal from the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) regarding its P.L. 638 contract, in which the issue now before the Board, inter alia, was raised. 15/ Stating that "[n]othing in P.L. 93-638 or in the FY 1986 Appropriations Bill language for the Bureau specifically precludes

15/ The decision was appealed to the Board but dismissed for lack of Jurisdiction. Great Lakes Indian Fish & Wildlife Commission v. Assistant Secretary--Indian Affairs, 15 IBIA 77 (1986), reconsideration denied, 15 IBIA 87 (1987).

the Bureau from retaining a portion of funds appropriated for the GLIFWC for contract administration and monitoring purposes," the Assistant Secretary found that "the Bureau has authority to withhold funds for program administration purposes, and that the [Minneapolis Area Office] decision to withhold $19,918 of GLIFWC contract funds was not unreasonable." The Assistant Secretary therefore affirmed the Minneapolis Area Office's August 13, 1986, decision with respect to this issue. Because the instant appeal involves policy-related budgetary issues, it is particularly appropriate for the Board to give deference to a decision of the Assistant Secretary--Indian Affairs concerning the same issue. Cf. Willie v. Commissioner of Indian Affairs, 10 IBIA 135 (1982); Kiowa Business Committee v. Anadarko Area Director, 14 IBIA 196 (1986). Therefore, the Board will defer to the Assistant Secretary's October 22, 1986, decision. The Board also finds that the Assistant Secretary's decision is independently supported by the materials it has reviewed for this appeal.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 21, 1984, decision of the Phoenix Area Director is affirmed.

Anita Vogt
Acting Chief Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge